CCA
CENTRAL CITY ASSOCIATION OF LOS ANGELES

May 21, 2019

Council President Herb Wesson
Los Angeles City Council
200 N. Spring Street
Los Angeles, CA 90012

Re: *May 22nd City Council: Item 24-Mitchell v. City of Los Angeles*

Dear Council President Wesson,

Established in 1924, Central City Association (CCA) is committed to advancing Downtown's vibrancy and increasing investment in the region. We are a membership organization comprised of approximately 400 organizations that employ about 350,000 people. It is on behalf of our members that we would like to convey our deep concerns regarding *Mitchell v. City of Los Angeles (Mitchell)*.

We ask that you reconsider any decision before you that would result in a settlement in the *Mitchell* case. We are aware that the City Council already voted to settle this case on March 6, 2019. **However, we ask that you reexamine your findings in light of recent actions, including procedural issues outlined in an enclosed letter sent last month by Gibson Dunn and a Council motion asking for analysis of homeless litigation and settlements as well as an analysis of how other cities address public rights-of way.**

On April 11, 2019, Gibson Dunn, on behalf of CCA, sent a letter to the City Attorney raising concerns about the process by which *Mitchell* was considered in closed session. We believe *Mitchell* is establishing citywide policy and should therefore be considered publicly in order to comply with the Brown Act.

In the letter we also raise concerns about the City's ability to exempt some areas or some residents from existing laws in order to settle litigation. A *Mitchell* settlement that only applies to a specific area of Downtown Los Angeles underscores this concern. We hope that you will raise these significant issues with the City Attorney and proceed accordingly.

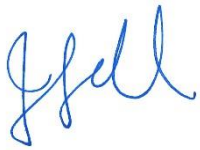
In addition, on May 17, 2019, Councilmember Rodriguez introduced a motion asking for a comprehensive overview on homeless litigation and analysis of how other cities treat their public right-of-way. We believe this review is long overdue and that it should take place prior to the *Mitchell* settlement being finalized.

We believe this analysis and the concerns in the Gibson Dunn letter will be important in any future reviews of LAMC 56.11. CCA encourages the City Council to hold any policy discussions regarding LAMC 56.11 in open session to increase transparency, improve discourse and better the policy outcome.

Thank you for your consideration. We stand ready to work with you and the entire City Council on these matters.

CCA
CENTRAL CITY
ASSOCIATION
OF LOS ANGELES

Sincerely,



Jessica Lall
President & CEO
Central City Association

Cc: The Los Angeles City Council
Mayor Eric Garcetti
City Attorney Mike Feuer
Chief Michel Moore, LAPD

Encl: April 11, 2019 Gibson Dunn letter
Council File 19-0513

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April 11, 2019

VIA EXPRESS MAIL AND EMAIL

The Honorable Michael Feuer
Office of the Los Angeles City Attorney
James K. Hahn City Hall East, Suite 800
Los Angeles, CA 90012

Re: *Proposed Settlement of* Mitchell v. City of Los Angeles

Dear City Attorney Feuer:

We write as counsel for the Central City Association of Los Angeles, a membership organization comprised of civic, business and community leaders, to express our client's deep concern regarding the City's impending settlement of the lawsuit entitled *Mitchell v. City of Los Angeles*, Case No. 16-CV-01750-SJO (C.D. Cal.). CCA believes that the City may be on the verge of entering into an illegal and unenforceable settlement.

As you know, the *Mitchell* lawsuit was filed three years ago. The City has power to settle the *Mitchell* lawsuit at this preliminary stage of the litigation, however unwise that may be. (The Court only granted a preliminary injunction and contemplated the presentation of evidence at a future trial.) What the City may not do is rewrite its laws behind closed doors under the guise of reaching a "settlement."

Yet this appears to be exactly what the City is doing. The proposed settlement far exceeds a typical compromise; the City, for instance, is not offering a one-time sum to aggrieved litigants. Instead the City seems to believe that it can abandon laws on the books, at least as to certain people or geographic areas. This is wrong.

There is only one way to make law in Los Angeles: in public. It cannot be pieced together in City Council and Committee meetings closed to the public or in private gatherings of lawyers. And, just as important, once a law is enacted in the transparent, democratic way, it applies to all, equally. The City cannot pass a city-wide law and decide years later that the law will only apply to some residents or certain areas. That is anathema to the rule of law.

Especially with a challenging and complex issue like homelessness, lawmaking is time-consuming for a reason: it requires input from numerous community stakeholders that are affected by such decisions and the task of balancing competing policy priorities and

evidence. But these difficulties do not allow the City Council or City Attorney to short-circuit the democratic process. To the contrary, this situation uniquely calls for the creation of policy through the lawful methods that are likely to produce the best results. Redrafting City law by way of a privately negotiated settlement is legally flawed and only exposes the City to further litigation.

A settlement that commits the City to refuse to enforce existing law, or otherwise to alter existing City ordinances, is illegal for two independent reasons.

First, Los Angeles cannot effectively exempt some residents, or some areas within the City, from the law simply because the City wishes to rid itself of litigation. A settlement is nothing more than a contract, and a City, by way of a contract, cannot simply "agree" that certain citizens or neighborhoods are above the law—or outside of it.

In California, a "law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. Courts regularly reiterate—including with respect to Los Angeles specifically—that a city has no power to agree to a settlement that "contractually exempts settling parties from ordinances . . . that apply to everyone else and would, except for the agreement, apply to the settling parties." *Summit Media LLC v. City of Los Angeles*, 211 Cal. App. 4th 921, 937 (2012); *Cnty. Mobilehome Positive Action Comm., Inc. v. Cnty. of San Diego*, 62 Cal. App. 4th 727, 739–741 (1998); *Trancas Prop. Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 182 (2006); *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1053 (9th Cir. 2007).

For example, in *Trancas*, a developer, in settling with the City of Malibu, essentially received a variance that exempted it from zoning laws. But such variances require meeting certain legal hurdles, like public hearings. The court held that "[c]ircumvention of them by contract is impermissible." 138 Cal. App. 4th at 182. Here, the Downtown area outlined in the proposed settlement would apparently be exempt from L.A. Municipal Code Section 56.11, which prohibits the keeping of unlimited amounts of personal property on public rights-of-way.

The principle that forbids a developer from obtaining a waiver of the law applies to everyone. The problem with such waivers is that they involve a city consenting to a violation of the law for certain individuals, even though the law itself makes no such exemption. Put another way, by such an act, city officials pick and choose who is subject to the law, and who is not, simply because it is expedient to do so.

If the City agreed to withhold enforcement of Section 56.11, for instance, then that law (or part of it) would in effect be wiped from the books. It is clear that, right now, the City is under no obligation to alter the law as a result of any court decision. As matters stand, Section

56.11 is a constitutional ordinance and no court has held otherwise. Judge Otero, in his *Mitchell* orders, specifically *declined* to rule on Section 56.11. *See Mitchell v. City of Los Angeles*, Case No: 2:16-CV-01750-SJO, Doc. 102 at 5 ("whether or not amended LAMC § 56.11 is enforceable…is not ripe for determination"). To the contrary, he emphasized, repeatedly, that his order was "narrow" and "preliminary." *Id.* at Doc. 51 at 4, 10.

The process that the City Council utilized to consider *Mitchell* is concerning. It suggests that a City Council unable or unwilling to revise an ordinance lawfully could simply invite a collusive suit, then quietly "agree" to a settlement that achieved the same legislative result. This would let lawmakers operate without the accountability or transparency that serve to ensure honest and open government and the rule of law.

In sum, a settlement that alone purports to abrogate or alter existing City law is beyond the City's power. The *Mitchell* settlement cannot commit the City to enforce its law in ways that exempt certain areas or selected groups from compliance.

Second, the Brown Act, Gov't. Code § 54950, *et seq*., requires that public affairs be conducted in public. A city can negotiate or receive legal advice about a settlement in closed session, but if the terms of that settlement require the city effectively to *change* the law in compliance with that settlement, then the city has engaged in private lawmaking.

The proposed *Mitchell* settlement does not involve the compromise of a mere slip-and-fall injury or some other routine monetary claim. It involves citywide policy. Specifically, it threatens to significantly impact laws like Section 56.11, a reasonable measure that was the result of years of public policymaking and that was meant to be one component to address the City's most urgent humanitarian crisis.

To change the law, the City must follow the rules of transparent government. As *Trancas* explained, the City's authority to discuss a settlement privately does not empower a City to take action that "may not be taken without a public hearing and an opportunity for the public to be heard." 138 Cal. App. 4th at 186. Otherwise the City's power to evaluate settlements would become a means to "authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit." *Id.* The City cannot employ settlements as a "subterfuge to reach nonlitigation oriented policy decisions." *Id.* (citation omitted).

The Brown Act's statement of purpose declares that the people "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Gov't. Code § 54950. The closed session proceedings at the City Council meeting concerning the *Mitchell* settlement illustrate the very problem that the Brown Act was designed to prevent.

On March 6, 2019, for instance, the City Council held a hearing on whether it should settle *Mitchell*. But the City Council never disclosed, even in summary form, what the substance of that settlement might be. Thus, the twenty minutes of public comment were devoted only to the homeless crisis generally or to the reasons, in the abstract, for or against settling. There was also public comment at the three preceding Homelessness & Poverty Committee meetings where this matter was likewise discussed in closed session. Over 100 people spoke on this item with great interest, but with every settlement the details are what matter. It was only after the public-comment period was closed on March 6, 2019, that the City Council proceeded to discuss the settlement in closed session for as many as *three and a half hours*.

During this time the public had no way of knowing what precisely was on the table; or what the council members were advised by the City Attorney; or what the reasoning was of these elected officials in ultimately agreeing to settle. In fact, the minutes for this three-and-a-half-hour period simply state: "Council discussed this matter in closed session and instructed City Attorney staff to settle this matter."[1] That tells the public nothing about what the settlement will actually say or do, let alone why it is in the City's interest to do so.

The result is that no opportunity has yet existed for the public to comment on the actual terms of the contemplated settlement. If the City settles now, the people of Los Angeles will be able to see the settlement concluded in their name only *after* the settlement is signed. This demonstrates a lack of understanding of the principle that policymaking should be done in public. Los Angeles has long been subject to criticism for too many closed-door settlements. By contrast, in San Francisco, for instance, a public hearing is required by law *before* the city reaches a settlement that would, like here, purport to change the city's "policy" or "practice." *See* S.F. Admin. Code § 67.12(b)(3).

The bottom line is that any settlement that would have the effect of repealing or creating new law must be done consistently with the Brown Act. This means a meaningful hearing on the actual proposal and a public vote—as is necessary to accomplish virtually every other change in our law. Settlements are not a means of circumventing the legislative process. The City Council's most important duty is policymaking; it should never outsource this obligation to the City Attorney's Office.

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For over a decade the City of Los Angeles has allowed its homelessness policy to be dictated through settlements, undermining each legislative gain with a corresponding legal

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[1] *See* https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=18-0751.

setback. This approach, routinely conducted outside of the public view, has done nothing to address the homelessness crisis, which has only grown more acute with each passing day. This course of conduct is not only contrary to principles of democratic accountability, but in the present instance, if the settlement purports to change the law, it will be illegal.

Sincerely,

Theane Evangelis

TE/jt

HOMELESSNESS AND POVERT

MOTION

In recent years, the City of Los Angeles has been impacted by litigation concerning the rights of homeless persons in relation to the City's policies and procedures for maintaining the public realm. These legal issues include the storage of property in the public right-of-way, vehicle dwelling on city streets, and other related topics. In addition to rulings directed uniquely at the City of Los Angeles, other court rulings in jurisdictions outside the City have also impacted policy, such as the recent decision by the 9th circuit Federal District Court that struck down an anti-camping law.

Given the magnitude of the homelessness crisis facing the City, legal challenges concerning the rights of individuals in relation to City policy are likely to continue. Therefore, having a clear understanding of these legal issues is fundamental as the City tries to build off of its notable efforts and ongoing commitment to address this crisis.

There are numerous cases (pending or settled) that have shaped and limited the City of Los Angeles's policy and operational protocols. As we continue to seek solutions to resolve the homelessness crisis, we need to understand fully and clearly the legal framework that governs our policy and program development. Additionally, the regional scope of the homelessness crisis calls for a coordinated effort to address it. Thus, it is important to understand the differences between the City's policies and procedures and those of its County neighbors.

I THEREFORE MOVE that the Chief Legislative Analyst's Office, in consultation with the City Attorney, report to the City Council on all homeless-related litigation brought against the City of Los Angeles that is settled, pending, or threatened. The report should include details of any decisions and settlement terms, and how City policies, procedures, and operations have been changed in response to these cases.

I FURTHER MOVE that the report include a comparative analysis that juxtaposes City of Los Angeles public right-of-way policy and protocols with those of neighboring municipalities in the County of Los Angeles.

PRESENTED BY: Monica Rodriguez
MONICA RODRIGUEZ
Councilwoman, 7th District

SECONDED BY:

MAY 17 2019

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